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No. 04-433

IN THE

Supreme Court of the United States

JOSEPH ANZA, VINCENT ANZA, AND NATIONAL STEEL SUPPLY, INC.,
Petitioners,

v.

IDEAL STEEL SUPPLY CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS

RICHARD L. HUFFMAN
WILLIAM M. BRODSKY
V. DAVID RIVKIN
FOX HORAN & CAMERINI LLP
825 Third Avenue, 12th Floor
New York, New York 10022
(212) 480-4800

HARRY FIRST
40 Washington Square South
New York, New York 10012
(212) 998-6211

DAVID C. FREDERICK
Counsel of Record
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

January 12, 2006

QUESTION PRESENTED

Whether a competitor is "injured in his business or property by reason of a violation" of the Racketeer Influenced and Corrupt Organizations Act ("RICO") where the alleged predicate acts of racketeering activity were mail and wire fraud but the competitor was not the party defrauded and did not rely on the alleged fraudulent behavior.

RULE 29.6 STATEMENT

Petitioner National Steel Supply, Inc. is a privately owned entity. It has no parent corporation, and there is no publicly held company that owns 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES vii

INTRODUCTION 1

OPINIONS BELOW 2

JURISDICTION 3

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

1. The statutory scheme 3

2. The facts of this case as alleged in the amended complaint 5

3. The proceedings below 6

SUMMARY OF ARGUMENT 10

ARGUMENT 13

I. IN A CIVIL RICO ACTION INVOLVING PREDICATE ACTS OF MAIL AND WIRE FRAUD, A NON-DEFRAUDED COMPETITOR'S LOSS OF BUSINESS IS NOT AN INJURY "BY REASON OF" THE RICO VIOLATION 13

A. Ideal's Alleged Injuries Do Not Satisfy The Proximate-Cause Requirement Of *Holmes* Because They Are Not Sufficiently Direct .. 13

1. *Holmes* requires a direct causal connection between the alleged violation and the claimed injury 13

2. Ideal cannot establish a direct connection between the alleged racketeering activity and its lost profits 15

B. Ideal Cannot Establish Proximate Causation In This Mail And Wire Fraud-Based RICO Suit Because It Was Not The Party Defrauded 21

C. The Court Of Appeals' "Target" Test Erroneously Focuses On The Defendant's Purported Motive And Ignores The Required Objective Inquiry Into The Connection Between The Violation And The Injury 23

II. IN A MAIL AND WIRE FRAUD-BASED CIVIL RICO SUIT, A PLAINTIFF MUST SHOW THAT IT RELIED ON THE MISREPRESENTATION TO BE INJURED "BY REASON OF" A VIOLATION OF THE STATUTE 24

A. Reliance In Misrepresentation Cases Is Required By Common-Law Principles That Inform The Elements Of Private Claims Under RICO 25

1. This Court looks to the common law in interpreting RICO's private right of action 25

2. A reliance requirement in misrepresentation cases is consistent with the text of § 1964(c) 28

3. The courts of appeals are nearly unanimous in requiring reliance 29

B. Third-Party Reliance Of The Type Permitted By The Court Of Appeals Is Not An Adequate Substitute For Reliance By The Plaintiff Because It Is Unprecedented Under The Common Law 31

III. TO PERMIT THIS SUIT TO GO FORWARD WOULD UNDULY EXPAND THE SCOPE OF THE PRIVATE RICO TREBLE-DAMAGES ACTION 35

A. The Second Circuit's Rule Would Upset The Remedial Balance In The Tax-Fraud And Antitrust Fields And Would Open The Floodgates For Civil RICO Claims Based On Allegations Of Accounting Fraud 36

B. Allowing Non-Defrauded Competitors To Sue Under RICO Would Transform Run-Of-The-Mill State-Court Disputes Between Business Rivals Into Federal Civil RICO Actions 41

CONCLUSION 43

TABLE OF AUTHORITIES

Page

CASES

Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940) 43

Appletree Square I, Ltd. P'shp v. W.R. Grace & Co., 29 F.3d 1283 (8th Cir. 1994) 30

Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983) 4, 11, 13, 15, 17, 19, 22, 23, 24, 25

Bank of China v. NBM LLC, 359 F.3d 171 (2d Cir. 2004), *cert. dismissed*, 126 S. Ct. 675 (2005) 25

Basic Inc. v. Levinson, 485 U.S. 224 (1988) 29

Beck v. Prupis, 529 U.S. 494 (2000) 3, 25, 26, 30

Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982) 24

Brittingham v. Mobil Corp., 943 F.2d 297 (3d Cir. 1991) 20

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 23

Buxton Mfg. v. Valiant Moving & Storage, Inc., 657 N.Y.S.2d 450 (App. Div. 2d Dep't 1997) 32

Cement & Concrete Workers Dist. Council Welfare Fund v. Lollo, 148 F.3d 194 (2d Cir. 1998) 32

Chisolm v. TranSouth Fin. Corp., 95 F.3d 331 (4th Cir. 1996) 30

Clark v. McDaniel, 546 N.W.2d 590 (Iowa 1996) 33

Cleveland v. United States, 531 U.S. 12 (2000) ... 21, 43

Dura Pharm., Inc. v. Broudo, 125 S. Ct. 1627 (2005) 27, 30

Eaton, Cole & Burnham Co. v. Avery, 83 N.Y. 31 (1880) 33

Escoett & Co. v. Alexander & Alexander, Inc., 296 N.Y.S.2d 929 (App. Div. 1st Dep't 1969) 32

Field v. Mans, 516 U.S. 59 (1995) 26, 27, 29, 32

Fromer v. Yogel, 50 F. Supp. 2d 227 (S.D.N.Y. 1999) .. 32

Geernaert v. Mitchell, 37 Cal. Rptr. 2d 483 (Cal. Ct. App. 1995) 33

Georgia v. Evans, 316 U.S. 159 (1942) 20

Gregory v. United States, 253 F.2d 104 (5th Cir. 1958) 35

Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992) 1, 2, 4, 8, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 29, 30, 40

Ideal Steel Supply Corp. v. Anza, No. 02 CV 4788, 2005 U.S. Dist. LEXIS 6781 (S.D.N.Y. Apr. 18, 2005) 37

Illinois Dep't of Rev. v. Phillips, 771 F.2d 312 (7th Cir. 1985) 19, 37

Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc., 61 F.3d 1250 (7th Cir. 1995) .. 21, 22, 25

Kaufman v. i-Stat Corp., 754 A.2d 1188 (N.J. 2000) .. 33

Kelly v. L.L. Cool J., 145 F.R.D. 32 (S.D.N.Y. 1992), *aff'd*, 23 F.3d 398 (2d Cir. 1994) 32

McKenzie v. Comcast Cable Communications, Inc., 393 F. Supp. 2d 362 (D. Md. 2005) 32

McNally v. United States, 483 U.S. 350 (1987) 22

Michigan v. Fawaz, No. 86-1809, 1988 WL 44736 (6th Cir. May 9, 1988) 19-20

Ming v. Woolfolk, 116 U.S. 599 (1886) 27

Miranda v. Ponce Fed. Bank, 948 F.2d 41 (1st Cir. 1991) 1

National Org. for Women, Inc. v. Scheidler, 510 U.S. 249 (1994) 20

Neder v. United States, 527 U.S. 1 (1999) .. 26, 27, 28, 30

New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) .. 42

Newton v. Tyson Foods, Inc., 207 F.3d 444 (8th Cir. 2000) 17, 22

NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998) 37, 38, 39

Pasquantino v. United States, 125 S. Ct. 1766 (2005) 20, 26, 27, 37

Peerless Mills, Inc. v. American Tel. & Tel. Co., 527 F.2d 445 (2d Cir. 1975) 32

Ruffing v. Union Carbide Corp., 764 N.Y.S.2d 462 (App. Div. 2d Dep't 2003), *appeal dismissed*, 1 N.Y.3d 621 (2004) 34

Scheidler v. National Org. for Women, Inc., 537 U.S. 393 (2003) 35

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) 23, 35

Sikes v. Teleline, Inc., 281 F.3d 1350 (11th Cir. 2002) 29

Southern Pac. Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531 (1918) 17

Summit Props. Inc. v. Hoechst Celanese Corp., 214 F.3d 556 (5th Cir. 2000) 30, 41, 42

Systems Mgmt., Inc. v. Loiselle, 303 F.3d 100 (1st Cir. 2002) 30

Town of Concord v. Boston Edison Co., 915 F.2d 17 (1st Cir. 1990) 39

Union Carbide Corp. v. Montell N.V., 9 F. Supp. 2d 405 (S.D.N.Y. 1998) 34

United States v. Busher, 817 F.2d 1409 (9th Cir. 1987) 36

United States v. Rowe, 56 F.2d 747 (2d Cir. 1932) 28

USA Certified Merchants, LLC v. Koebel, 262 F. Supp. 2d 319 (S.D.N.Y. 2003) 20

Vandenbroeck v. CommonPoint Mortgage Co., 210 F.3d 696 (6th Cir. 2000) 30

Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) 39

WorldCom, Inc. Sec. Litig., In re, 219 F.R.D. 267 (S.D.N.Y. 2003), *appeal granted in part sub nom. Hevesi v. Citigroup, Inc.*, 366 F.3d 70 (2d Cir. 2004) 40

STATUTES

Clayton Act, 15 U.S.C. §§ 12-17 ..... 20, 25

§ 4, 15 U.S.C. § 15 ..... 4, 13

Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922:

§ 1, 84 Stat. 922 3

§ 1, 84 Stat. 923 3

§ 904(a), 84 Stat. 947 15

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ..... 1, 3

18 U.S.C. § 1961(1) 5

18 U.S.C. § 1961(4) 5

18 U.S.C. § 1962 5

18 U.S.C. § 1962(a) 4, 5, 7, 9, 20

18 U.S.C. § 1962(b) 4, 5

18 U.S.C. § 1962(c) 4, 5, 6, 7, 9, 20

18 U.S.C. § 1962(d) 4, 20, 26

18 U.S.C. § 1963 4

18 U.S.C. § 1964(a) 4

18 U.S.C. § 1964(b) 4

18 U.S.C. § 1964(c) 4, 6, 7, 10, 13, 20, 25, 28, 29

Sherman Act, § 2, 15 U.S.C. § 2 39

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 39

18 U.S.C. § 1341 ..... 3, 5, 22

18 U.S.C. § 1343 ..... 3, 5

28 U.S.C. § 1254(1) 3

N.Y. Gen. Bus. Law § 349 (McKinney 2004) 42

N.Y. Tax Law (McKinney 2004):

§§ 1101 *et seq.* 5

§ 1101(b)(4)(I) 5

§ 1105(a) 5

§ 1115(a)(15) 5

§ 1116(a)(4) 5

§ 1132(c)(1) 5

§ 1145 19

§ 1817 19

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Restatement (Second) of Torts (1977) 27, 29, 31, 33

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INTRODUCTION

This case is the most recent episode in a long-running feud between the principals of two closely held corporations. It involves claims brought by respondent Ideal Steel Supply Corp. ("Ideal") under the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 — "the litigation equivalent of a thermonuclear device," as civil RICO has been described, *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991). Ideal's theory is that petitioners National Steel Supply, Inc. and its two owners, Joseph and Vincent Anza (collectively, "National"), are liable for treble damages and attorneys' fees because National engaged in "a pattern of racketeering activity" by allegedly defrauding New York of sales taxes. According to Ideal, National's alleged tax fraud facilitated National's selling of products more cheaply to purchasers who then abandoned Ideal in sufficient numbers that Ideal sold fewer goods and therefore lost profits.

In accepting that Rube Goldberg-esque chain of events as sufficient to overcome National's motion to dismiss — which the district court had granted — the Second Circuit committed grave errors of law and logic that warrant reversal. First, the court below ignored this Court's requirement of a "direct" relation between the RICO predicate act and the plaintiff's claimed injury as an element of proximate cause. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265-68 (1992). The damages allegedly suffered by Ideal here are at least several steps removed in the causal chain and are in any event too attenuated to satisfy *Holmes'* requirement of a "direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 268-69. Ideal also fails to meet the proximate-cause requirement of RICO for the independent reason that it was not the party defrauded by the alleged scheme. As such, Ideal falls outside the purposes of the mail and wire fraud statutes, which form the basis for the predicate acts supporting the asserted violations of RICO. Because the mail and wire fraud statutes were not

intended to protect non-defrauded third parties like Ideal, Ideal cannot, consistent with the common-law requirement of proximate cause that this Court articulated in *Holmes*, recover under civil RICO for violations of those statutes.

Wholly independent of those explanations for why Ideal cannot establish proximate cause, the Second Circuit further erred in allowing Ideal — as a third party to whom National made no misrepresentations — to satisfy the requirement of reliance by invoking the State's reliance on National's alleged fraud. Not only is the Second Circuit's novel theory a departure from the common law, which required reliance by the plaintiff in a fraud action, but it also paradoxically threatens to make a federal RICO action for treble damages far easier to plead than a state-law fraud claim. Nothing in RICO suggests that Congress intended such a result.

If accepted by this Court, the Second Circuit's approach gives a litigation weapon of great destructive force to civil plaintiffs, who can turn common allegations of unfair competitive advantage — which under state law might be difficult to plead and prove — into federal RICO claims. Unleashing civil RICO in all routine commercial suits would upset various federal remedial schemes and federalize garden-variety business tort and contract suits. Because the Second Circuit's holding goes far beyond what Congress intended in enacting RICO and the consequences would be truly profound and deleterious for the American economy, this Court should reverse.

OPINIONS BELOW

The opinion of the court of appeals (JA 32-57) is reported at 373 F.3d 251. The decision and order of the district court (JA 21-31) is reported at 254 F. Supp. 2d 464.

JURISDICTION

The court of appeals entered its judgment on July 2, 2004. The petition for a writ of certiorari was filed on September 29, 2004, and was granted on November 28, 2005. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968, and the mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, respectively, are reproduced in the appendix to this brief.

STATEMENT OF THE CASE

1. ***The statutory scheme.*** Congress's purpose in enacting RICO was to eradicate organized crime in the United States. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1, 84 Stat. 922, 923; *see also Beck v. Prupis*, 529 U.S. 494, 496-97 (2000) (describing the statutory scheme and Congress's goals in passing it). Congress found that organized crime was "a highly sophisticated, diversified, and widespread activity that annually drain[ed] billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption." Pub. L. No. 91-452, § 1, 84 Stat. 922. The result was to "weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens." *Id.* at 923. Concluding that the existing "sanctions and remedies available to the Government [were] unnecessarily limited in scope and impact," Congress sought in passing RICO to "strengthen[ ] the legal tools in the evidence-gathering process," to "establish[ ] new penal prohibitions," and to "provid[e] enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." *Id.*

To that end, Congress provided severe criminal penalties for violations of RICO, *see* 18 U.S.C. § 1963, and authorized the Government to bring civil actions to "prevent and restrain" RICO violations, *id.* § 1964(a), (b). Additionally, the statute created a private right of action for treble damages for any person "injured in his business or property by reason of" a RICO violation. *Id.* § 1964(c). In *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), this Court held that the phrase "by reason of" in § 1964(c) requires a plaintiff to prove that the defendant's RICO violation was both a cause in fact and a proximate cause of its claimed injury. *See id.* at 265-68. In so holding, this Court relied on its prior decision in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), which interpreted similar statutory language in § 4 of the Clayton Act.

RICO contains four substantive prohibitions. First, § 1962(a) makes it "unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." Second, § 1962(b) makes it "unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." Third, § 1962(c) makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." Fourth, § 1962(d)

makes it "unlawful for any person to conspire to violate any of the provisions of" § 1962(a), (b), or (c).

Section 1961(1) provides an exhaustive list of acts — commonly referred to as "predicate acts" — that constitute "racketeering activity" under § 1962. That list includes mail fraud in violation of 18 U.S.C. § 1341 and wire fraud in violation of 18 U.S.C. § 1343. The mail and wire fraud statutes prohibit the use of those means of communication in furtherance of "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." *Id.* §§ 1341, 1343. Section 1961(4) defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

2. ***The facts of this case as alleged in the amended complaint.*** National and Ideal are competitors in the retail sale of steel mill products and related hardware, supplies, and services. They sell those products in a lumber-yard setting to ornamental ironworkers, small steel fabricators, and do-it-yourself homeowners. They each have two stores in New York City, one in the Bronx and one in Queens, each located "a few minutes' drive" from the other. JA 6 (Compl. ¶¶ 2-3).

Generally, the two firms must charge their customers a sales tax, the proceeds of which they remit to the State of New York. *See* N.Y. Tax Law §§ 1101 *et seq.* (McKinney 2004). Several types of sales are exempt from that tax, such as transactions in which the buyer intends to resell the goods in a subsequent taxable sale, *see id.* §§ 1101(b)(4)(I), 1105(a), 1132(c)(1); and purchases by a tax-exempt entity (such as a school or church), *see id.* §§ 1115(a)(15), 1116(a)(4).

According to the allegations in Ideal's amended complaint, National had a practice of not charging sales tax to non-exempt retail purchasers who paid in cash. National allegedly failed to report those cash sales to the New York

State Department of Taxation and to pay the required sales tax on them. *See* JA 6 (Compl. ¶ 4). That conduct, Ideal alleged, gave National "an improper competitive advantage." JA 13 (Compl. ¶ 32). Although Ideal's prices were "the same or lower on average" than National's, when it came to non-exempt cash sales on which National allegedly failed to collect and to pay sales tax, National's "overall cost to customers [was] typically lower than Ideal's for the same goods and services" because Ideal charged customers the sales tax. *Id.* (Compl. ¶ 33). Ideal further alleged that, after National opened a new facility in the Bronx in 2000 — "just eight minutes by automobile" from Ideal's pre-existing Bronx location, *see* JA 10 (Compl. ¶ 20) — Ideal experienced a "steep drop in taxable cash sales" that was "disproportionate to the effect that National's new Bronx location had on Ideal's overall sales." JA 13-14 (Compl. ¶ 35).

3. ***The proceedings below.*** As the magistrate judge below recognized, "there are complications" in this case "beyond just the issues that would appear on the face" of the pleadings. Hearing Tr. at 16, *Ideal Steel Supply Corp. v. Anza*, No. 02 CV 4788 (S.D.N.Y. Nov. 18, 2004). Ideal and National are family-run businesses, and the two families are related. But relations between them have soured, leading to what the magistrate judge described as a "family feud," reminiscent of the "Hatfields and McCoys." *Id.* The parties have aired their disputes in judicial fora before,[1] and this case represents the latest salvo in this long-running feud.

a. Ideal sued National and its two owners, Joseph and Vincent Anza, under civil RICO, 18 U.S.C. § 1964(c), asserting that the Anzas were "person[s]" conducting an "enterprise" (*i.e.*, National) through a pattern of racketeering activity, in violation of § 1962(c). The alleged filings of fraudulent New York State sales tax returns were asserted

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[1] For example, the third claim in this complaint arises out of a prior litigation between these parties.

to be violations of the federal mail or wire fraud statutes (depending on whether they were filed by mail or electronically), thus constituting the necessary pattern of racketeering activity. *See* JA 15-16 (Compl. ¶¶ 45-47). Ideal further alleged that, although the fraud was "perpetrated on the State," it was "directed at and directly injure[d]" Ideal because the conduct was aimed at "increasing National's market share and overall profits" at the expense of its "principal competitor," Ideal. JA 16 (Compl. ¶ 49). As a result, Ideal claimed that it lost "a substantial volume of its taxable cash business," causing a corresponding loss of "a substantial amount of profits and market share." *Id.* (Compl. ¶ 50).

Ideal also asserted a violation of § 1962(a), which prohibits investing "racketeering income" in an "enterprise." It alleged that the Anzas and National were "person[s]" who had invested racketeering income derived from the alleged untaxed sales at National's Queens store in National's new Bronx location (the RICO "enterprise" for this claim). *See* JA 17 (Compl. ¶¶ 55, 56). Ideal claimed that it had "lost significant business and market share" as a result of National's investment in its new Bronx store. JA 17-18 (Compl. ¶ 57).

Ideal sought damages in excess of $5 million for the alleged racketeering activity and in excess of $2 million for the investment of racketeering proceeds, both of which it asked to be trebled under § 1964(c). According to the complaint, the $5 million figure represented profits lost as a result of National's violation of § 1962(c). The complaint did not explain, however, from where it derived the $2 million in damages allegedly caused by the violation of § 1962(a). Ideal also sought attorneys' fees under § 1964(c).

b. National moved to dismiss Ideal's complaint on several grounds, including failure to allege proximate causation. The district court granted National's motion. It concluded that Ideal had not pleaded causation adequately because the complaint did not assert that Ideal relied on National's

alleged fraudulent misrepresentations to the New York State taxing authority. *See* JA 27-30.[2]

c. The court of appeals reversed. The court began its analysis by referencing *Holmes*' proximate-cause requirement and by reviewing a number of its prior cases concluding that indirectly injured plaintiffs could not recover under RICO because their claims did not satisfy that requirement. *See* JA 40-45. The court distinguished those cases from this one, however, because in those cases "the plaintiffs were not competitors of the racketeering enterprise or targets of alleged racketeering activity." JA 46. Additionally, the court acknowledged the general rule that a civil RICO plaintiff alleging violations of the mail and wire fraud statutes must show that it relied on the fraud. *See* JA 51-53. But the court concluded that reliance by a third party, rather than the plaintiff, sufficed. *See* JA 51-54. According to the court,

> the principle governing the present case is that where a complaint contains allegations of facts to show that the defendant engaged in a pattern of fraudulent conduct that is within the RICO definition of racketeering activity and that was intended to and did give the defendant a competitive advantage over the plaintiff, the complaint adequately pleads proximate cause, and the plaintiff has standing to pursue a civil RICO claim. This is so even where the scheme depended on fraudulent communications directed to and relied on by a third party rather than the plaintiff.

JA 53.

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[2] Ideal's amended complaint also asserted a state-law breach-of-contract claim based on an alleged violation of a settlement agreement resolving prior litigation between the two companies. Having dismissed the civil RICO claim, the district court declined to exercise supplemental jurisdiction over the state-law claim and thus dismissed it without prejudice. *See* JA 30-31.

Applying that principle to the facts of this case, the court of appeals concluded that Ideal's suit should be permitted to go forward. The court explained that a sufficient causal connection between the alleged violation of § 1962(c) and the claimed injury had been asserted:

> [National's] mailings or electronic transmissions of fraudulent sales tax reports to the State Tax Department were an essential part of the . . . scheme [to avoid charging sales tax on cash sales], for without the fraudulent reports, and the State's reliance on them, defendants would have had to pay the uncollected sales taxes out of their own assets. The principal intended victim of the scheme was Ideal, over which [National] sought to secure a competitive advantage by giving certain cash customers an unlawful benefit, and by concealing that unlawful conduct and retaining the resulting profits by means of racketeering activity. Accordingly, we conclude that Ideal, as a competitor directly targeted by [National] for competitive injury, has standing to assert its RICO claims against [National] for violations of § 1962(c) based on the alleged predicate acts of mail and wire fraud.

JA 54. Similarly, the court concluded that Ideal had stated a valid claim based on a violation of § 1962(a). That was because "part of the proceeds of [the alleged] scheme may properly be viewed as racketeering income, indirectly derived from [the] pattern of mail and wire frauds, given that those frauds enabled [National] to avoid paying [8 1/4] percent of those proceeds to the State," and the complaint alleged that National used those profits to fund the opening of National's Bronx location. JA 55. The court of appeals accordingly vacated the district court's dismissal of Ideal's complaint. *See* JA 57.

SUMMARY OF ARGUMENT

I. RICO provides a private right of action for damages to "[a]ny person injured in his business or property by reason of" a violation of that statute. 18 U.S.C. § 1964(c). Under *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), a civil RICO plaintiff must show that its claimed injury was both actually caused and proximately caused by the defendant's illegal conduct. Ideal cannot establish proximate causation, for two reasons.

First, a "central element[ ]" in the proximate-cause analysis is "directness" — "a demand for some direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 268-69. Directness is important because the less direct an injury, the more difficult it becomes to ascertain the damages "attributable to the violation"; the more likely it is that damages will have to be apportioned among plaintiffs; and the less valuable the whole exercise will be, given that directly injured plaintiffs can bring suit without those attendant problems. *Id.* at 269. Here, Ideal's alleged injury to its business was not direct. The alleged fraud was in National's alleged misrepresentation to New York State tax authorities of the extent of its cash sales. The direct injury from that misrepresentation was an underpayment of sales tax. That injury is easily measured and recovered, with penalties, under New York State law, or possibly even pursued by the State as a plaintiff under RICO.

The damages sought by Ideal, however, are of a different sort, relating not to the fraud at all but to the possible indirect competitive effects of the fraud. Those damages are more speculative, requiring the parties to trace the effects of the alleged tax underpayments on competition between them during the period when the payments were undetected. Those damages might depend, for example, on the extent to which National's non-tax-exempt cash customers would have been willing to switch to Ideal if National began charging tax, or might have still purchased from National,

or might have chosen some other alternative in the market. Under *Holmes*, that effort to trace the possible (and highly attenuated) consequences of a misrepresentation of tax liability should be avoided.

Second, damages recovery under civil RICO for injuries caused by violations of the mail and wire fraud statutes should be restricted to the injury suffered by the party that was defrauded. Doing so is consistent with the traditional common-law principle that a civil plaintiff cannot recover for a violation of a statute unless it is among the persons protected by the law. The mail and wire fraud statutes protect those whom wrongdoers seek to defraud. Thus, only defrauded parties can recover treble damages and attorneys' fees under RICO for violations of those statutes.

The court of appeals decided, however, that Ideal had stated a valid claim because it alleged that it was a competitor "directly targeted" for competitive injury. That subjective "target" approach to the proximate-cause inquiry cannot be reconciled with this Court's decision in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), on which this Court relied in *Holmes* in articulating civil RICO's proximate-cause requirement. *Associated General Contractors* establishes that a defendant's motive does not provide a basis for subjecting it to liability for losses not proximately caused by its illegal conduct.

II. In any event, even if Ideal could show that its losses were the direct result of National's alleged fraud and overcome the common-law rule restricting recovery to defrauded parties, dismissal of its suit would be required nonetheless. A civil RICO plaintiff alleging fraudulent misrepresentations must show that it relied on the defendant's misrepresentations. Reliance was a requirement for fraud actions at common law and therefore constitutes the background rule against which Congress enacted the RICO private right of action. Accordingly, many courts have adopted a reliance requirement in fraud-based RICO private suits (including

the Second Circuit itself), but the panel below decided that reliance by the New York State tax authorities was sufficient to satisfy that requirement. That holding erroneously derogated from the common law. Although third-party reliance was sometimes recognized at common law, none of the recognized exceptions applies here.

III. To permit this suit to go forward would expand the RICO private treble-damages action beyond what Congress intended, leading to the creation of a federal law of unfair competition. The concept of fraud under the federal mail fraud statute has proved to be extremely elastic. Under the Second Circuit's rule, business firms could seize on a range of conduct engaged in by their competitors, allege some misrepresentation, and seek treble damages for the "unfair competitive advantages" that might have been facilitated by that misrepresentation.

Permitting business rivals to sue for indirect competitive injuries allegedly facilitated by some violation of the mail or wire fraud statutes would upset carefully balanced federal remedial schemes in the areas of tax fraud, accounting fraud, and antitrust. Additionally, the cause of action recognized by the court of appeals would disrupt the federal-state balance in this area by providing a powerful incentive for civil plaintiffs to bring garden-variety tort and contract claims arising out of commercial disputes in federal court under civil RICO. There is no reason to believe that Congress intended such sweeping consequences, particularly when the background common-law rules for proving damages from fraud under the RICO statute require careful analysis of proximate cause and reliance by the plaintiff on the defendant's misrepresentations. Given the presence of state fraud and unfair-competition law, there is no need to relax RICO standards to provide an additional federal treble-damages remedy.

ARGUMENT

I. IN A CIVIL RICO ACTION INVOLVING PREDICATE ACTS OF MAIL AND WIRE FRAUD, A NON-DEFRAUDED COMPETITOR'S LOSS OF BUSINESS IS NOT AN INJURY "BY REASON OF" THE RICO VIOLATION

A. Ideal's Alleged Injuries Do Not Satisfy The Proximate-Cause Requirement Of *Holmes* Because They Are Not Sufficiently Direct

1. *Holmes* requires a direct causal connection between the alleged violation and the claimed injury

RICO provides a private right of action for damages to "[a]ny person injured in his business or property by reason of" a violation of that statute. 18 U.S.C. § 1964(c). Drawing on *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), which interpreted functionally identical language in § 4 of the Clayton Act, this Court held in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), that, for a plaintiff to allege an injury "by reason of" a RICO violation, it must plead that the violation was both a cause in fact and a proximate cause of that claimed injury. *See id.* at 265-68. By "proximate cause," the Court meant the "label" that is generically applied to the "judicial tools used to limit a person's responsibility for the consequences of that person's own acts." *Id.* at 268. One such tool, the Court noted, "was a demand for some direct relation between the injury asserted and the injurious conduct alleged." *Id.* A plaintiff complaining of harm "from the misfortunes visited upon a third person by the defendant's acts" is generally thought "to stand at too remote a distance to recover." *Id.* at 268-69.

The Court explained that claims based on indirect injuries are not actionable for three reasons. *See id.* at 269-70. First, directness is important because the less direct an injury, the more difficult it becomes to ascertain,

as a factual matter, the correct amount of damages "attributable to the violation." *Id.* at 269. Second, permitting recovery of damages by less directly injured parties increases the chance of multiple recoveries, and hence the need for "complicated rules" to apportion damages among the complaining parties. *Id.* Third, suit by the directly injured party offers the benefit of deterring improper conduct but without the costs involved in permitting less direct plaintiffs to sue. *Id.* at 269-70. This Court made clear that the "directness" inquiry was to be "informed" by those concerns. *Id.* at 272 n.20.

Applying that analysis to the facts of the case, the Court held that the plaintiff's civil RICO suit failed because it could not establish the required element of proximate cause. *See id.* at 270-74. There, the Securities Investor Protection Corporation ("SIPC") sued Holmes, alleging that he had engaged in a scheme to manipulate the stock value of a corporation that he controlled. *See id.* at 263. The stock manipulation perpetrated by Holmes and others had driven two broker dealers into bankruptcy, and the SIPC had been forced to advance nearly $13 million to cover the losses of the customers of those broker dealers. *See id.* at 262-63. In rejecting the SIPC's claim, the Court reasoned that, even if the SIPC were to stand in the shoes of the customers, "the link [was] too remote between the stock manipulation alleged and the customers' harm, being purely contingent on the harm suffered by the broker-dealers." *Id.* at 271.

Additionally, the Court explained that each of the concerns motivating the directness requirement applied. First, "[i]f the nonpurchasing customers were allowed to sue, the district court would first need to determine the extent to which their inability to collect from the broker-dealers was the result of the alleged conspiracy to manipulate, as opposed to, say, the broker-dealers' poor business practices or their failures to anticipate developments in the financial markets." *Id.* at 272-73. Second, even if factual causation could be shown, "the district court would then have to find some way to apportion the possible respective recoveries by

the broker-dealers and the customers, who would otherwise each be entitled to recover the full treble damages." *Id.* at 273. Third, "the law would be shouldering these difficulties despite the fact that those directly injured, the broker-dealers, could be counted on to bring suit for the law's vindication." *Id.*

Finally, the Court rejected the SIPC's reliance on RICO's liberal-construction clause, *see* Pub. L. No. 91-452, § 904(a), 84 Stat. 947, on the ground that there was nothing illiberal in its interpretation of the statute. The Court noted that it had not held "that RICO cannot serve to right the conspirators' wrongs," but merely that the SIPC was not a proper plaintiff. 503 U.S. at 274. Indeed, the Court observed, "RICO's remedial purposes would more probably be hobbled than helped by SIPC's version of liberal construction" because "[a]llowing suits by those injured only indirectly would open the door to 'massive and complex damages litigation[, which would] not only burde[n] the courts, but [would] also undermin[e] the effectiveness of treble-damages suits.'" *Id.* (quoting *Associated Gen. Contractors*, 459 U.S. at 545) (second through fifth alterations in original).

2. Ideal cannot establish a direct connection between the alleged racketeering activity and its lost profits

a. Ideal has not pleaded the necessary element of proximate cause because it has failed to allege a "direct relation between the injury asserted and the injurious conduct alleged," as required by *Holmes*, 503 U.S. at 268. *See* 1 Kevin P. Roddy, *RICO in Business and Commercial Litigation* § 7.03, at 7-4 (1995) ("[I]f a plaintiff fails to allege and prove that a causal nexus exists between his, her, or its injury and the RICO predicate acts, the plaintiff lacks standing to sue under § 1964(c).").

Ideal averred that National failed to charge sales tax to some of its customers, specifically, those who did not purchase its steel mill products for resale (presumably,

"do-it-yourself" homeowners) and who were able to pay in cash. Ideal further alleged that National then misrepresented the extent of its cash sales to the New York State Department of Taxation and Finance, thereby lowering its sales tax liability. Those misrepresentations, Ideal alleged, constituted a fraud "perpetrated on the State." JA 16 (Compl. ¶ 49).

The causal connection between that alleged illegal conduct and the injury claimed by Ideal — lost profits — is highly attenuated, at best. As an initial matter, Ideal's allegations do not even establish that its claimed injury was in fact caused by National's fraud. In and of themselves, National's alleged fraudulent misrepresentations to the State caused Ideal no injury. Indeed, National could have engaged in all of the illegal conduct that forms the basis of the asserted RICO violation without causing Ideal to lose any profits whatsoever. Instead of charging lower prices, National might simply have retained the unlawful tax savings. And, on the other hand, it certainly was not necessary for National to defraud New York to charge lower prices. National may have had lower costs, or it may have been willing to reduce its profit margin to obtain additional sales.

Ideal cannot establish the required "direct relation between the injury asserted and the injurious conduct alleged," *Holmes*, 503 U.S. at 268, merely by pleading that its injury — though caused by legal conduct, the charging of lower prices — was made easier by illegal conduct, alleged acts of mail fraud. The direct effect of the illegal conduct alleged was to deprive New York of tax revenue. Ideal's claimed injury — lost profits — did not directly result from National's alleged tax fraud. Rather, the loss of those profits stemmed from a complex chain of events: The lost profits were caused by lost sales; the lost sales (it is asserted) were the result of National charging lower prices; National charged lower prices (according to Ideal) because it did not collect and remit sales tax; and National (allegedly) submitted false sales tax returns to facilitate its

refusal to charge and pay sales tax. Even if it were assumed that the alleged fraud actually caused Ideal's lost profits, the connection between the two is insufficiently direct to state a claim under *Holmes*. As this Court there explained, plaintiffs cannot seek recovery for indirect injuries because "'"[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step."'" *Id.* at 271-72 (quoting *Associated Gen. Contractors*, 459 U.S. at 534 (quoting in turn *Southern Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918) (Holmes, J.))); *see Newton v. Tyson Foods, Inc.*, 207 F.3d 444, 447 (8th Cir. 2000) (beef producers could not establish proximate cause in civil RICO suit against chicken producer for alleged lost sales caused by fraud in connection with government poultry inspections).

b. Additionally, the concerns animating the directness requirement that this Court identified in *Holmes* each apply here.

i. The principal reason for rejecting the indirect-injury claim in *Holmes* was that "the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors." 503 U.S. at 269 (citing *Associated Gen. Contractors*, 459 U.S. at 542-43).

To determine the amount of Ideal's damages, if any, a fact-finder would be required to trace the effects of National's alleged tax underpayments on competition between National and Ideal for the four years (or more) during which National allegedly engaged in that practice. A reduction of 8 1/4% in National's prices (the amount of the sales tax) to cash-paying, non-tax-exempt purchasers does not necessarily mean a lost sale for Ideal, however. First, some of Ideal's lost customers might have switched to National for some reason unrelated to price. Second, some of National's prices might have been lower than Ideal's even without any price reduction attributable to tax underpayments. Even if Ideal were to prove the allegations in its complaint, it

claims only that its prices were the same or lower "on average." JA 13 (Compl. ¶ 33). Third, some of Ideal's lost customers might have chosen sellers other than National. Ideal alleges that the parties' four stores are the only ones in Queens and the Bronx that offer their "comprehensive array of products." JA 9-10 (Compl. ¶¶ 19, 20). But that does not address whether there are substitute sellers in Queens or the Bronx of the particular products that Ideal's lost customers bought or whether the geographic market for the parties' products might extend beyond those two boroughs. Fourth, another potential causal explanation for Ideal's lost profits could be "poor business practices." *Holmes*, 503 U.S. at 273. Tracing out the effects of National's tax underpayments, therefore, would require an understanding of the product and geographic markets within which the parties compete, their pricing and marketing practices, the extent to which their customers' buying decisions were driven by price, and, ultimately, the effect on profitability occasioned by any lost sales.

Such an inquiry would be unduly burdensome and is not the type of extended fishing expedition Congress reasonably would have intended.

ii. The *Holmes* Court also observed that declining to hear claims based on indirect injuries spares courts the trouble of apportioning recovery among the directly and indirectly injured victims, "who would otherwise each be entitled to recover the full treble damages." 503 U.S. at 273. If New York were to take action against National with respect to the allegations of tax evasion at issue here, the district court would be forced to make difficult decisions about the extent to which both the State and Ideal can recover treble damages from National stemming from the same underlying violation.[3]

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[3] Additionally, if Ideal's suit is permitted to go forward, the door would be opened for additional indirect plaintiffs to seek treble damages and attorneys' fees from National. For example, Ideal's suppliers could sue, on the theory that National's alleged fraud reduced *their* profits

iii. The difficulties of proof associated with these complicated questions outweigh the social value in affording Ideal the opportunity to make its case. As this Court recognized in *Holmes*, wrestling with such difficult questions of causation and apportionment "is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely." 503 U.S. at 269-70 (citing *Associated Gen. Contractors*, 459 U.S. at 541-42). New York State was the direct victim of the fraud alleged here. In contrast to the complexities involved in ascertaining the amount of damages (if any) suffered by Ideal as an indirect result of National's alleged tax fraud, the extent of the State's injury can presumably be calculated in a rather straightforward way. Once the underpayment of tax liability is discovered, the State could calculate the amount of back taxes owed and then add in any interest and penalties that would also be due. *See* N.Y. Tax Law § 1145 (McKinney 2004). If New York State determined that this was a particularly grievous example of tax fraud, it could also seek criminal penalties against National and its owners. *See id.* § 1817. Although presumably New York State has decided that this statutory structure provides adequate deterrence for tax fraud violations, it might still attempt to pursue civil treble-damages remedies in federal court under RICO, either as an alternative or in addition to any action under state law.[4]

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because a less-profitable Ideal purchased less from those suppliers. The court below offered no support for the notion that Congress intended to permit recovery of full treble damages by a litany of plaintiffs at different levels removed from the same underlying violation.

[4] *Compare Illinois Dep't of Rev. v. Phillips*, 771 F.2d 312, 314 (7th Cir. 1985) (denying motion to dismiss RICO complaint brought by Department of Revenue for treble damages arising out of fraudulent sales tax filings; language of RICO statute "makes no distinction between state governments, consumers, competitors, or other victims in determining who qualifies as a person under the Act"), *with Michigan*

Given the uncertainties inherent in accurately tracing the competitive effects of National's alleged tax underpayments and the availability of the actually defrauded "better plaintiff" to pursue the direct damages from the alleged fraud, *Holmes* requires that Ideal's more speculative business losses be considered indirect. Tax underpayments are the losses proximately caused by this alleged fraud; profits that Ideal might have lost are not.[5]

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v. Fawaz, No. 86-1809, 1988 WL 44736, at *2 (6th Cir. May 9, 1988) (judgment noted at 848 F.2d 194) (fraud in reporting sales tax; defendant already subject of state restitutionary order for taxes and penalties; held: although the State is a "person" for RICO purposes, complaint dismissed because district court should not be a collection agent for unpaid state tax). *Cf. Pasquantino v. United States*, 125 S. Ct. 1766, 1771-72 (2005) (government's right to uncollected taxes is "property" within the meaning of the wire fraud statute); *Georgia v. Evans*, 316 U.S. 159, 162 (1942) (permitting State to bring treble-damages action for its damages from price-fixing; State is a "person injured" under treble-damages provision of Clayton Act).

[5] Although the plaintiff in *Holmes* invoked only § 1962(c) and (d), *see* 503 U.S. at 265 n.9, the directness analysis set forth above applies equally to the second claim in Ideal's amended complaint alleging a violation of § 1962(a). Ideal's only allegation of injury is that it lost profits as a result of lost market share stemming from National's lower prices that were facilitated by alleged mail and wire fraud. Ideal's § 1962(a) theory, therefore, is derivative of the same alleged predicate violations. The connection between Ideal's claimed injury and the underlying predicate violations asserted in its complaint is too attenuated to satisfy § 1964(c)'s proximate-cause requirement as articulated in *Holmes*. Additionally, Ideal's § 1962(a) claim, which alleges that National and the Anzas violated RICO by investing in National's Bronx location, fails because a civil RICO plaintiff does not plead an injury proximately caused by a violation of § 1962(a) merely by alleging that a corporate defendant reinvested profits back into itself. *See, e.g., Brittingham v. Mobil Corp.*, 943 F.2d 297, 304-05 (3d Cir. 1991); *USA Certified Merchants, LLC v. Koebel*, 262 F. Supp. 2d 319, 331 (S.D.N.Y. 2003); *cf. National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 259 (1994) ("The 'enterprise' referred to in [§ 1962(a) and (b)] is thus something acquired through the use of illegal activities or by money obtained from illegal activities. The enterprise in these subsections is the victim of unlawful activity[.]"). National's remaining arguments also apply equally to both of Ideal's civil RICO claims.

B. Ideal Cannot Establish Proximate Causation In This Mail And Wire Fraud-Based RICO Suit Because It Was Not The Party Defrauded

In any event, even if Ideal's alleged injury were sufficiently direct to satisfy *Holmes*, its complaint would still fail to allege the required element of proximate cause. A civil RICO plaintiff whose suit is based on predicate acts of mail or wire fraud cannot prove proximate causation unless it can show that it was defrauded by the defendant. Consequently, because the State of New York was the party allegedly defrauded by National's purported violations of the mail and wire fraud statutes — and not Ideal — Ideal has failed to plead proximate causation.

In *Holmes*, this Court "adopted common-law approaches to decide when RICO authorizes recovery for derivative injuries." *Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1258 (7th Cir. 1995) (Easterbrook, J.). A settled principle of common law is that "[a] plaintiff claiming injury by the defendant's violation of a statute must show not only that the defendant violated the law but also that the plaintiff is among the persons protected by the law." *Id.* (citing W. Page Keeton, *et al.*, *Prosser and Keeton on the Law of Torts* 728 (5th ed. 1984) ("*Prosser & Keeton on Torts*")); *accord* 1 J. G. Sutherland, *A Treatise on the Law of Damages* § 32, at 124 (4th ed. 1916) ("Whenever an action is brought for breach of duty imposed by statute the party bringing it must show that he had an interest in the performance of the duty and that the duty was imposed for his benefit. But where the duty was created or imposed for the benefit of another and the advantage to be derived to the party complaining of its breach from its performance is merely incidental and no part of the design of the statute, no such right is created as forms the subject of an action.").

The mail and wire fraud statutes were intended to protect those whom wrongdoers seek to defraud. *See Cleveland v. United States*, 531 U.S. 12, 18-19 (2000) (noting that " 'the original impetus behind the mail fraud statute was to

protect the people from schemes to deprive them of their money or property' ") (quoting *McNally v. United States*, 483 U.S. 350, 356 (1987)); *see also Israel Travel*, 61 F.3d at 1258 ("the victims of the fraud are the object of solicitude; § 1341 does not establish a regimen of truth-telling without regard to details like who is losing out and why"). Accordingly, in *Israel Travel*, the Seventh Circuit upheld the dismissal of a suit by a company that alleged that its competitor had (successfully) defrauded potential customers in seeking their business (resulting in lost sales for the company). *See id.* The court explained that § 1341 "does not protect vendors to persons who may be deceived, and firms suffering derivative injury from business torts therefore must continue to rely on the common law and the Lanham Act rather than resorting to RICO." *Id.*[6]

A similar concern animated this Court's proximate-cause analysis in *Associated General Contractors*. There, the Court also examined the "nature of the plaintiff's alleged injury" to determine whether it was related to the purpose of the statutory right the plaintiff sought to vindicate. 459 U.S. at 538. The Court held that a labor union's suit could not proceed because the union was complaining about effects in the market for building contracting and subcontracting rather than in any market for labor services, *see id.* at 527 & n.14, and it was unclear how promoting competition in that market would advance the union's objectives, *see id.* at 539. Because the purpose of an antitrust claim is to advance consumer welfare through marketplace competition, the proximate cause analysis confined the damages recovery to less than all of the consequences that the defendant's conduct might have produced.

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[6] *Cf. Holmes*, 503 U.S. at 286-90 (Scalia, J., concurring in the judgment) (concluding that RICO incorporates the common-law zone-of-interests requirement, which looks to whether "the plaintiff is within the class of persons sought to be benefitted by the provision at issue"); *Newton*, 207 F.3d at 447 (zone-of-interests test suggests that only consumers have standing to sue chicken producer for alleged fraud in connection with government poultry inspections).

In *Associated General Contractors*, the Court's concern for whether the labor union's injury was "of the type that the antitrust statute was intended to forestall," *id.* at 540, was connected to the separate inquiry into "antitrust injury" required for private-party standing under the antitrust laws. *See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Although there is no analogue to "antitrust injury" in RICO, *see Holmes*, 503 U.S. at 269 n.15 (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495-97 (1985)), the connection between the purpose of the underlying predicate statute and the plaintiff's injury is relevant as part of RICO's proximate-cause inquiry. That aspect of the requirement of proximate cause in RICO private treble-damages actions informs the extent to which the law confines the scope of liability for consequential injury.

Because the asserted fraud was "perpetrated on the State," JA 16 (Compl. ¶ 49) — and not Ideal — Ideal cannot establish that its claimed injury was proximately caused by the alleged illegal conduct of National.

C. The Court Of Appeals' "Target" Test Erroneously Focuses On The Defendant's Purported Motive And Ignores The Required Objective Inquiry Into The Connection Between The Violation And The Injury

Here, the court of appeals ignored this Court's articulation of RICO's proximate-cause requirement in *Holmes*, erroneously substituting a "target" test for the proximate-cause inquiry mandated by *Holmes*. *See* JA 54 ("a competitor directly targeted . . . for competitive injury" can assert fraud-based RICO claims).

This Court's decision in *Associated General Contractors* confirms that a "target" test is not an appropriate substitute for the proximate-cause inquiry required by *Holmes*. There, the plaintiff labor union brought an antitrust suit against an association of building and construction contractors for allegedly coercing landowners, their own members, and other general contractors to deal with non-union

subcontracting firms. Although the defendants did not boycott the union, the lower court found that the defendants "specifically intended" to harm the union and its members by engaging in the boycotting activities. *See* 459 U.S. at 525. Nevertheless, this Court held that the union did not have standing to bring suit. Articulating the proximate-cause approach on which *Holmes* later drew, the Court pointed out that " '[t]he availability of the [Clayton Act] § 4 remedy . . . is not a question of the specific intent of the conspirators.' " *Id.* at 537 (quoting *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 479 (1982)). Instead, factors other than motive should be "of controlling importance." *Id.* at 537 n.37, 538. The factors used by the Court focused on the objective inquiry subsequently mandated for RICO treble damages in *Holmes*, including the "remote" and "speculative" character of the alleged economic harm, *id.* at 545 n.52, and the existence of "more direct victims" of the alleged boycott, *id.* at 545. For those reasons, and despite the intent of the defendants to harm the union, the Court held that the union had no standing to bring its antitrust suit. *See id.* at 545-46.

For the foregoing reasons, the Second Circuit's judgment should be reversed with instructions to dismiss this case. Ideal simply cannot plead the requisite proximate causation to sustain a civil RICO suit based on allegations that National engaged in a scheme to defraud the State.

II. IN A MAIL AND WIRE FRAUD-BASED CIVIL RICO SUIT, A PLAINTIFF MUST SHOW THAT IT RELIED ON THE MISREPRESENTATION TO BE INJURED "BY REASON OF" A VIOLATION OF THE STATUTE

Wholly independent of the contentions in Part I, the judgment below should be reversed because Ideal did not rely on the allegedly fraudulent statements of National. The court of appeals recognized that Ideal has not alleged the element of reliance, *see* JA 53-54, and Ideal has conceded that fact, *see* Br. in Opp. 3. Additionally, the court of

appeals acknowledged (as it had held in other cases, *see, e.g.*, *Bank of China v. NBM LLC*, 359 F.3d 171, 178 (2d Cir. 2004), *cert. dismissed*, 126 S. Ct. 675 (2005)) that civil RICO plaintiffs generally must establish reliance when their claims are based on allegations of fraudulent misrepresentations. *See* JA 53. Nevertheless, the court of appeals concluded that the reliance requirement was satisfied by Ideal's allegation that *the State of New York* relied on the alleged fraudulent misrepresentations in National's sales tax returns. *See* JA 54. That conclusion erroneously disregards the requirement of reliance by the plaintiff, which is an element of a private fraudulent-misrepresentation claim under RICO.

A. Reliance In Misrepresentation Cases Is Required By Common-Law Principles That Inform The Elements Of Private Claims Under RICO

1. This Court looks to the common law in interpreting RICO's private right of action

a. RICO creates a cause of action for those injured "by reason of" conduct that violates various federal statutes — relevant here, the mail and wire fraud statutes. *See* 18 U.S.C. § 1964(c). This Court's decisions establish that the elements of that cause of action derive from the common law. In *Holmes*, this Court held that the phrase "by reason of" "carries a [common-law] proximate-cause requirement within it." 503 U.S. at 266 n.12. In doing so, this Court relied on *Associated General Contractors*, which looked to the common law of torts in determining that the Clayton Act's treble-damages provision permits recovery only for proximately caused losses, *see* 459 U.S. at 533-34. Thus, "*Holmes* called for the use of common-law analogies under 18 U.S.C. § 1964(c)." *Israel Travel*, 61 F.3d at 1257.

The propriety of interpreting RICO's private right of action in light of settled common-law principles was further confirmed by this Court in *Beck v. Prupis*, 529 U.S. 494

(2000). There, the Court considered a civil RICO action alleging a conspiracy in violation of § 1962(d). The Court explained that that case did not "present simply the question of what constitutes a violation of § 1962(d), but rather the meaning of a civil cause of action for private injury by reason of such a violation." *Id.* at 501 n.6. Accordingly, the Court turned to the "well-established common law of civil conspiracy." *Id.* at 500-01. Similarly, here, this Court must determine the meaning of a civil cause of action for fraud. Thus, this Court should analyze the common law of fraud, just as it looked to the common law of conspiracy in *Beck*.

Examination of the common law of fraud in determining the elements of Ideal's claims accords with this Court's consistent practice of drawing on common-law understandings to interpret statutory terms and concepts — like fraud — "that have accumulated settled meaning under . . . the common law" on the ground that the "court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Field v. Mans*, 516 U.S. 59, 69-70 (1995) (interpreting Bankruptcy Code provisions barring discharge of debts resulting from "actual fraud" to require that the creditor need show only "justifiable reliance" on the fraud) (internal quotation marks omitted; ellipsis in original). Accordingly, this Court has turned to the common law when interpreting the mail and wire fraud statutes. In *Neder v. United States*, 527 U.S. 1 (1999), the Court construed the mail, wire, and bank fraud statutes to require proof that the misrepresentation or omission was material, despite the fact that the statutes do not mention such a requirement, explaining that "the common law could not have conceived of 'fraud' without proof of materiality." *Id.* at 22. And last Term in *Pasquantino v. United States*, the Court interpreted the meaning of "property" in the wire fraud statute and assessed whether prosecution under that statute of a scheme to defraud Canada of cigarette tax revenues conflicted with the "background" common-law revenue rule, which is not

referred to in the wire fraud statute. The Court concluded that "common law of fraud" confirmed that the right to receive tax revenues is "property" within the meaning of the statute and that the scope of the wire fraud statute does not conflict with the common-law revenue rule. *See* 125 S. Ct. at 1771-72, 1774.

b. The common law requires reliance in actions, like this one, involving fraudulent misrepresentations. At common law it was well accepted that in an action for fraud or deceit, whether by misrepresentation or omission, the plaintiff was required to prove reliance. *See, e.g., Prosser & Keeton on Torts* at 728 (elements of tort action in deceit that have "emerged from this [common-law] process of development" include "intention to induce the plaintiff to act or to refrain from action in reliance upon the misrepresentation"); Leon Green, *Deceit*, 16 Va. L. Rev. 749, 750 (1930) (false representation must be made "for the purpose of inducing the plaintiff to act" and "the plaintiff was induced thereby to act"); *see also Ming v. Woolfolk*, 116 U.S. 599, 602-03 (1886) (citing cases); *Black's Law Dictionary* 788 (4th ed. 1951) (defining fraud as "intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing"). The *Restatement (Second) of Torts* (1977) articulates the requirement as follows: "One who fraudulently makes a misrepresentation . . . for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation." *Id.* § 525.[7]

c. This Court's decision in *Neder* is not to the contrary. There, the question was whether, in a prosecution of a "scheme to defraud" under the federal mail, wire, or bank

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[7] This Court has characterized the *Restatement (Second) of Torts* as "the most widely accepted distillation of the common law of torts," *Field*, 516 U.S. at 70, and has quoted section 525 approvingly for its definition of the elements of the common law of deceit, *see Dura Pharm., Inc. v. Broudo*, 125 S. Ct. 1627, 1632 (2005).

fraud statutes, the Government must prove a "material" misrepresentation. Although the Court found nothing to "rebut th[e] presumption" that Congress intended to incorporate the common-law materiality requirement into the meaning of the term "scheme to defraud," 527 U.S. at 23, the Court also acknowledged that the criminal fraud statutes "did not incorporate *all* the elements of common-law fraud," pointing specifically to "justifiable reliance" and "damages," *id.* at 24-25. The Court explained that the fraud statutes only prohibit a "scheme to defraud," not the completed crime. Thus, requiring proof that the victim relied and suffered actual damages "would clearly be inconsistent with the statutes Congress enacted." *Id.* at 25.

Nothing in *Neder* suggests that requiring proof of reliance (or proof of actual damages) would be "inconsistent" with RICO's private right of action. In contrast to the criminal statute that this Court interpreted in *Neder*, the provision at issue here creates a private cause of action for damages. Indeed, the *Neder* Court recognized that crucial distinction between civil actions and criminal actions: Although it stated that proof of damages was not required in a criminal prosecution under the mail fraud statute, this Court quoted Judge Learned Hand for the proposition that " '[c]ivilly of course the [mail fraud statute] would fail without proof of damage, but that has no application to criminal liability.' " *Id.* (quoting *United States v. Rowe*, 56 F.2d 747, 749 (2d Cir. 1932)) (second alteration in original). Because nothing in civil RICO indicates that Congress intended to permit private parties to recover damages for violations of the mail and wire fraud statutes without proving the common-law elements of fraud, this Court should look to those elements in defining the cause of action at issue here.

2. A reliance requirement in misrepresentation cases is consistent with the text of § 1964(c)

RICO provides a private right of action for damages to "[a]ny person injured in his business or property by reason

of" a violation of that statute. 18 U.S.C. § 1964(c). This Court held in *Holmes* that, for a plaintiff to allege an injury "by reason of" a RICO violation, it must plead that the violation was both the cause in fact and the proximate cause of that claimed injury. *See* 503 U.S. at 265-68. When the alleged racketeering activity is mail and wire fraud involving misrepresentations, a plaintiff cannot establish the causal connection required by the text of § 1964(c), as interpreted in *Holmes*, without proof of reliance. If the recipient of the fraudulent misrepresentation knew that the representation was false and did nothing about it, or would have done nothing about it if it had known of the falsity, the misrepresentation did not cause the recipient any harm because the outcome would have been the same if it had not occurred. Thus, in the ordinary misrepresentation case, the reliance requirement simply functions as a necessary prerequisite to establishing the causation required by the language of § 1964(c). *See Restatement (Second) of Torts* § 546 ("causation in fact" for fraudulent misrepresentations shown when recipient "justifiably relies" on them); *cf. Field*, 516 U.S. at 66 ("[n]o one, of course, doubts that some degree of reliance is required to satisfy the element of causation inherent in" Bankruptcy Code provision that prohibits the discharge of debts for money or property "obtained by" fraud); *Basic Inc. v. Levinson*, 485 U.S. 224, 243 (1988) (observing that, in securities-fraud suits, "[r]eliance provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury").

3. The courts of appeals are nearly unanimous in requiring reliance

Because of the textual and common-law underpinnings of a reliance requirement, the courts of appeals have generally agreed that a plaintiff in a fraud-based RICO case must show that it relied on the defendant's misrepresentation. *See, e.g., Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1360 (11th Cir. 2002) (to prove injury in "a civil RICO case predicated upon mail or wire fraud," plaintiff must prove that he "relied to his detriment on misrepresentations made in

furtherance of that scheme") (internal quotation marks omitted); *Summit Props. Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 560-62 (5th Cir. 2000) ("[m]ost other circuits" require showing of detrimental reliance by the plaintiff; court imposes a "general requirement" of reliance, while suggesting an exception if plaintiff was the "target" of the fraud); *Vandenbroeck v. CommonPoint Mortgage Co.*, 210 F.3d 696, 701 (6th Cir. 2000) (for a cognizable claim for fraud under RICO, plaintiffs must show a material misrepresentation and "that plaintiffs in fact relied upon that material misrepresentation"); *Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996) ("where fraud is alleged as a proximate cause of the injury, . . . the plaintiff must have justifiably relied, to his detriment, on the defendant's material misrepresentation"); *Appletree Square I, Ltd. P'shp v. W.R. Grace & Co.*, 29 F.3d 1283, 1287 (8th Cir. 1994) (fraud-based RICO suit fails because plaintiff did not show it "detrimentally relied on any of the alleged misrepresentations").

One court of appeals has indicated, however, that reliance is simply a way to show proximate causation and, as such, can be dispensed with when there are other ways to show that the defendant's action caused the plaintiff's injury. *See Systems Mgmt., Inc. v. Loiselle*, 303 F.3d 100, 104 (1st Cir. 2002) ("[r]eliance is doubtless the most obvious way in which fraud can cause harm, but it is not the only way"; plaintiffs' harm was "a reasonably predictable consequence" of defendant's misrepresentations) (case dismissed for lack of showing of pattern of racketeering). That approach, however, erroneously conflates reliance and proximate cause in fraud-based civil RICO claims. Unless the concept of recovery for fraud is to be "unmoor[ed]" from its common-law meaning — which it is not, *Neder*, 527 U.S. at 23-24; *see Beck*, 529 U.S. at 500-01 & n.6; *Holmes*, 503 U.S. at 265-74 — a plaintiff must prove that it actually relied on the fraudulent misstatements and that the defendant's conduct was a proximate cause of the plaintiff's injury. *Cf. Dura Pharm.*, 125 S. Ct. at 1631 (requiring proof of both reliance

and proximate cause to recover damages for securities fraud).

B. Third-Party Reliance Of The Type Permitted By The Court Of Appeals Is Not An Adequate Substitute For Reliance By The Plaintiff Because It Is Unprecedented Under The Common Law

Even though Ideal did not rely on the alleged misrepresentations of National, the court of appeals held that a plaintiff, like Ideal, can bring a mail and wire fraud-based RICO claim "even where the scheme depended on fraudulent communications directed to and relied on by a third party rather than the plaintiff." JA 53. That judgment is erroneous because it expands RICO claims predicated on fraudulent misrepresentations far beyond the common-law moorings of fraud-based claims.

At common law, as a general rule, recovery for deceit was confined to plaintiffs who relied on the defendant's misrepresentations. As the *Restatement (First) of Torts* (1938) explained:

> The maker of a fraudulent misrepresentation in a business transaction is liable for pecuniary loss caused to its recipient by his reliance upon the truth of the matter misrepresented if his justifiable reliance upon the misrepresentation is a substantial factor in determining the course of conduct which results in his loss.

Id. § 546. *See also Restatement (Second) of Torts* § 546 ("[t]he maker of a fraudulent misrepresentation is subject to liability for pecuniary loss suffered by one who justifiably relies upon the truth of the matter misrepresented"); *id.* § 531 ("[o]ne who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons whom he intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation"); *id.* cmt. b ("For a misrepresentation to be a cause in fact of the

pecuniary loss that results from the plaintiff's action or inaction, the plaintiff must have relied upon the misrepresentation in incurring the loss.").[8]

In certain circumstances, the common law allows recovery when misrepresentations were made by a defendant to a third party, but only when (1) those misrepresentations

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[8] Thus, courts have consistently described the requirements for a common-law fraud action as including reliance by the plaintiff, and they have rejected claims where a non-relying party was suing, even if that party was harmed as a result of the fraud. *See, e.g., Cement & Concrete Workers Dist. Council Welfare Fund v. Lollo*, 148 F.3d 194, 196 (2d Cir. 1998) ("We hold that a plaintiff does not establish the reliance element of fraud for purposes of ERISA or New York law by showing only that a third party relied on a defendant's false statements."); *Peerless Mills, Inc. v. American Tel. & Tel. Co.*, 527 F.2d 445, 449-50 (2d Cir. 1975) ("[a] third party [who did not receive the misrepresentation from the defendant] can recover damages for a fraudulent misrepresentation if he can establish that he relied upon it to his detriment"); *McKenzie v. Comcast Cable Communications, Inc.*, 393 F. Supp. 2d 362, 375-76 (D. Md. 2005) (under Maryland law, liability for fraudulent misrepresentations made to defraud a third party requires proof that defendant intended to induce plaintiff's reliance on the misrepresentations and proof that plaintiff did reasonably rely); *Fromer v. Yogel*, 50 F. Supp. 2d 227, 244 (S.D.N.Y. 1999) (dismissing New York state-law claim for negligent misrepresentation because plaintiffs did not allege "that they in any way relied on the alleged misrepresentations made by Defendants to other potential investors"); *Kelly v. L.L. Cool J.*, 145 F.R.D. 32, 39 n.8 (S.D.N.Y. 1992) ("Plaintiff's claim that the alleged infringement perpetrated a fraud on the copyright office or on the general public is a claim based on misrepresentations to and reliance by third parties and thus, does not constitute a claim for fraud."), *aff'd*, 23 F.3d 398 (2d Cir. 1994) (Table); *Escoett & Co. v. Alexander & Alexander, Inc.*, 296 N.Y.S.2d 929, 929 (App. Div. 1st Dep't 1969) ("The representations of which the defendant complains were made to third parties and not to it, and those representations were relied upon by those third parties and not by it."). Although cases can be found accepting claims based on third-party reliance, *see, e.g., Buxton Mfg. v. Valiant Moving & Storage, Inc.*, 657 N.Y.S.2d 450, 454 (App. Div. 2d Dep't 1997) ("[f]raud . . . may also exist where a false representation is made to a third party, resulting in injury to the plaintiff"), when ascertaining the content of the common law, this Court looks to "the general common law of torts, the dominant consensus of common-law jurisdictions, rather than the law of any particular State," *Field*, 516 U.S. at 70 n.9.

were communicated to the plaintiff; (2) the plaintiff relied on them; and (3) the defendant anticipated that the plaintiff would receive and rely on the misrepresentations. *See Restatement (Second) of Torts* § 533 ("The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation . . . is made to a third person and the maker intends or has reason to expect that" it will be "communicated to the other, and that it will influence his conduct in the transaction or type of transaction involved."); *see also Prosser & Keeton on Torts* at 743-45.[9] But neither the drafters of the *Restatement (Second) of Torts* nor the leading commentators have even contemplated the possibility that a defendant could be liable to a plaintiff who did not rely on misrepresentations made to a third party.

Although the common law generally does not permit non-relying third parties to recover for misrepresentations, a few cases do allow such recoveries, but those limited

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[9] Cases of that type have arisen for more than a century. *See, e.g., Eaton, Cole & Burnham Co. v. Avery*, 83 N.Y. 31, 33-34 (1880) (action in deceit for misrepresentations made by defendant to credit agency; allowing recovery by plaintiff who extended credit in reliance on agency's report because the misrepresentations were intended to be communicated to such persons). Modern cases continue to address the issue. *See, e.g., Kaufman v. i-Stat Corp.*, 754 A.2d 1188, 1195 (N.J. 2000) ("Indirect reliance allows a plaintiff to prove a fraud action when he or she heard a statement not from the party that defrauded him or her but from that party's agent or from someone to whom the party communicated the false statement with the intention that the victim hear it, rely on it, and act to his or her detriment."); *Clark v. McDaniel*, 546 N.W.2d 590, 593-94 (Iowa 1996) (allowing suit by subsequent buyer against original seller of used car for misrepresenting year of back half of car; seller could expect misrepresentation to be passed on and subsequent buyer justifiably relied on the fraudulent dating); *Geernaert v. Mitchell*, 37 Cal. Rptr. 2d 483, 485 (Cal. Ct. App. 1995) (allowing suit by subsequent house purchaser who relied on misrepresentations made to earlier purchaser; "defendant will not escape liability if he makes a misrepresentation to one person *intending* that it be repeated and acted upon by the plaintiff").

exceptions involve circumstances not present here. Perhaps the most obvious example is that, when the agent was the relying party, the principal was allowed to sue. *See* William L. Prosser, *Misrepresentation and Third Persons*, 19 Vand. L. Rev. 231, 240-41 (1966) (citing cases); *Restatement (Second) of Agency* § 315 (1958) (permitting suit "whether the fraud is practiced upon the agent or upon the principal"). Other cases have allowed suit by a child where the parent relied, *see, e.g.*, *Ruffing v. Union Carbide Corp.*, 764 N.Y.S.2d 462 (App. Div. 2d Dep't 2003) (misrepresentation of safe working environment; child plaintiff subsequently born with birth defects), *appeal dismissed*, 1 N.Y.3d 621 (2004); or suit by a plaintiff that had relied on the valuation of an appraiser that had been deceived by the defendant, *see Union Carbide Corp. v. Montell N.V.*, 9 F. Supp. 2d 405, 411-12 (S.D.N.Y. 1998) ("third party effectively acts as proxy for both sides"; finding efficiency justification for "exception to the general rule" that the plaintiff itself must have relied on the defendant's misrepresentations). Although in those cases the relying parties were not technically agents, they were still acting on behalf of the plaintiff and the fraudulent transaction was still directly connected to the plaintiff's injury.

The rule adopted here by the court of appeals, however, is not confined to those narrow exceptions, but rather permits any non-relying plaintiff to sue for misrepresentations on which some other party allegedly relied, so long as the plaintiff claims that the defendant targeted the plaintiff for harm and that the fraudulent conduct was an "essential part" of the alleged scheme. *See* JA 54. Because that rule runs afoul of the common-law principles underlying fraud-based civil RICO actions, this Court should reject it.

III. TO PERMIT THIS SUIT TO GO FORWARD WOULD UNDULY EXPAND THE SCOPE OF THE PRIVATE RICO TREBLE-DAMAGES ACTION

RICO "has already 'evolv[ed] into something quite different from the original conception of its enactors,' warranting 'concern[s] over the consequences of an unbridled reading of the statute.'" *Scheidler v. National Org. for Women, Inc.*, 537 U.S. 393, 412 (2003) (Ginsburg, J., concurring) (quoting *Sedima*, 473 U.S. at 500) (alterations in original); *see* Lee Applebaum, *Is There a Good Faith Claim for the RICO Enterprise Plaintiff?*, 27 Del. J. Corp. L. 519, 521 (2002) (the civil RICO statute has "achieved an unimagined level of use against legitimate individuals and businesses in the civil litigation context"). Yet the unbridled reading of the court of appeals in this case, which permits a competitor to bring a fraud-based RICO claim against a rival for conduct the competitor alleges created a "competitive advantage" for that rival, augurs a sweeping expansion of the RICO private treble-damages remedy.

The elasticity of fraud as a legal concept has long been recognized. *See, e.g., Gregory v. United States*, 253 F.2d 104, 109 (5th Cir. 1958) (scheme to defraud is judged by a standard that is a reflection of "moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society"); 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 186, at 200 (13th ed. 1886) ("[i]t is not easy to give a definition of Fraud . . . and it has been said that these courts have, very wisely, never laid down as a general proposition what shall constitute fraud"). The mail and wire fraud statutes — violations of which form the predicate acts alleged in "[t]he vast majority of civil RICO cases," Susan Getzendanner, *Judicial "Pruning" of "Garden Variety Fraud" Civil RICO Cases Does Not Work: It's Time For Congress To Act*, 43 Vand. L. Rev. 673, 678 (1990) — correspondingly cover wide swaths of conduct. Recognizing that breadth, Chief Justice Rehnquist questioned "[w]hether it is a good idea to have a civil

counterpart for wire fraud and mail fraud" at all, considering that, "[w]ith the growth of long distance communication and technology, mail fraud and wire fraud — which applies to all telephone calls — have a much wider sweep now than they did when the statutes were enacted." Hon. William H. Rehnquist, *Remarks of the Chief Justice*, 21 St. Mary's L.J. 5, 9-10 (1989).

Acceptance by this Court of the Second Circuit's approach below would join the elasticity of the fraud statutes to the RICO statute, and then loosen RICO's proximate-cause standard and eliminate the common-law requirement of reliance by the plaintiff. Such a rule threatens to create a new federal law of "unfair competition," complete with treble damages and attorneys' fees. That expanded civil RICO cause of action would upset carefully balanced federal remedial schemes in various areas of the law and would disrupt the federal-state balance by transforming routine state-law tort claims into federal civil RICO actions. Congress could not have intended such far-reaching and disruptive consequences.

A. The Second Circuit's Rule Would Upset The Remedial Balance In The Tax-Fraud And Antitrust Fields And Would Open The Floodgates For Civil RICO Claims Based On Allegations Of Accounting Fraud

Tax-fraud. The most obvious type of case to which this decision will apply is other kinds of tax cases. Tax fraud is broader than the sales tax issue involved here; many business firms find themselves facing a variety of tax-liability issues. Whether those tax issues might actually constitute tax fraud, under the Internal Revenue Code or state tax laws, would not be dispositive in a civil RICO case. The critical question would be whether the filing of inaccurate tax forms would constitute a "scheme to defraud" under the mail fraud statute. If the judgment below is affirmed, it will be hard to argue that such filings do not. *See United States v. Busher*, 817 F.2d 1409, 1412 (9th Cir. 1987)

(mailing fraudulent tax returns can be a predicate act of mail fraud under RICO, even though RICO does not include tax fraud as a predicate act) (citing cases); *see also Illinois Dep't of Rev.*, 771 F.2d at 316-17 (permitting State to sue for treble damages arising out of fraudulent sales tax filings); *cf. Pasquantino*, 125 S. Ct. at 1771-72 (government's right to uncollected taxes is "property" within the meaning of the wire fraud statute).

The concern for expanding claims of the sort allowed by the Second Circuit in this case to underpayment of federal taxes is not fanciful. Following the filing of the petition for a writ of certiorari in this case, Ideal moved to amend its complaint to include an allegation that National had engaged "in an 'income tax free sales' scheme . . . to gain a competitive advantage over Ideal 'by [knowingly] filing false income tax returns and defrauding the Internal Revenue Service and the New York State Department of Taxation and Finance.'" *Ideal Steel Supply Corp. v. Anza*, No. 02 CV 4788, 2005 U.S. Dist. LEXIS 6781, at *3 (S.D.N.Y. Apr. 18, 2005) (brackets in original).[10] Without regard to the very different (and even less direct) effects of underpayment of income tax, that subsequent filing shows how easy it will be for other competitors to complain that their rivals are gaining an unfair competitive advantage by underpaying their federal and state income taxes.

Antitrust. The court of appeals' rule creates an incentive to recast antitrust cases as mail fraud-based RICO claims so as to avoid the antitrust standards that this Court has articulated in recent years for competitor complaints. Two recent decisions of this Court illustrate the havoc that would be wreaked if civil RICO were regularly employed by business rivals.

First, in *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998), the plaintiff sued its competitor and NYNEX for a

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[10] The second amended complaint is not part of the record before this Court.

conspiracy in which NYNEX paid the plaintiff's competitor higher prices, "hoodwink[ed]" the New York Public Service Commission ("PSC") by passing on the high prices through rates approved by the PSC, and then received a year-end rebate from the competitor. *Id.* at 131-32. Discon sued NYNEX for engaging in a boycott of its premises equipment-removal services. The Second Circuit had held that boycott to be *per se* unlawful, but this Court reversed, holding that the boycott should be assessed under a rule of reason, which would permit full consideration of the competitive effects of the conduct in question. The Court explained as follows:

> To apply the *per se* rule here — where the buyer's decision, though not made for competitive reasons, composes part of a regulatory fraud — would transform cases involving business behavior that is improper for various reasons . . . into treble-damages antitrust cases. And that *per se* rule would discourage firms from changing suppliers — even where the competitive process itself does not suffer harm.
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> The freedom to switch suppliers lies close to the heart of the competitive process that the antitrust laws seek to encourage. . . . At the same time, other laws, for example, "unfair competition" laws, business tort laws, or regulatory laws, provide remedies for various "competitive practices thought to be offensive to proper standards of business morality." 3 P. Areeda & H. Hovenkamp, Antitrust Law ¶651d, p. 78 (1996). Thus, this Court has refused to apply *per se* reasoning in cases involving that kind of activity. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) ("Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws"); 3 Areeda & Hovenkamp, *supra*, ¶651d, at 80 ("[i]n the presence of substan-

> tial market power, some kinds of tortious behavior could anticompetitively create or sustain a monopoly, [but] it is wrong categorically to condemn such practices . . . or categorically to excuse them").

525 U.S. at 136-37 (internal and parallel citations omitted; alterations in original).

The second case is *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). In *Trinko*, this Court upheld the dismissal of a suit by a consumer of telecommunications services who alleged that Verizon had violated § 2 of the Sherman Act by breaching its duty under the Telecommunications Act of 1996 to share its facilities with its competitors. Verizon's conduct had been examined by the Federal Communications Commission and the New York PSC, both of which had imposed financial penalties for noncompliance, along with remedial measures. *See id.* at 403-04. In finding no violation of the antitrust laws, this Court noted that antitrust analysis "'must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies,'" *id.* at 411 (quoting *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, J.)), and that, "[t]o safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct," *id.* at 407 (emphasis omitted).

The care with which this Court approached the allegedly anticompetitive behavior in *Discon* and *Trinko* would not be duplicated in a mail fraud-based civil RICO litigation. The regulatory fraud in *Discon*, readily translatable into a fraud complaint, would not be weighed under a rule-of-reason approach. The only question would be the financial impact on the competitor, not the impact on competition as tested under a rule of reason. Similarly, it would be easy for a competitor of Verizon to allege misrepresentations in Verizon's statements to regulators and seek treble damages for lost revenue. *See* Brief for Covad Communications

Company, Inc. as *Amicus Curiae* in Support of Respondent, *Verizon Communication Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (No. 02-682), 2003 WL 21755938 (competitor of Verizon alleging misrepresentations by Verizon to state commissions regarding availability of space in central offices for collocating facilities). The impact of such liability on incentives to invest in new facilities, however, would go unexplored in a RICO suit.

Accounting fraud. Affirming the court of appeals in this case would open the door to a flood of suits by competitors of any corporation accused of accounting malfeasance. Accounting fraud has been at the heart of the major corporate scandals of the past few years, involving a long list of companies such as Enron, WorldCom, HealthSouth, and Tyco.[11] Competitors of those corporations no doubt felt that the fraud allowed the companies to gain a "competitive advantage" over them. Indeed, following the initial revelation of MCI's accounting fraud, it was suggested that "the most far-reaching effects of the financial shenanigans at companies like WorldCom, Global Crossing and Qwest were the dislocations and costs they caused for the companies that tried to compete with them," with competitors complaining that "competing against WorldCom for the attention of investors and Wall Street analysts in recent years was essentially like running track against an athlete who is later discovered to be using steroids." Seth Schiesel, *Trying to Catch WorldCom's Mirage*, N.Y. Times, June 30, 2002, at Sec. 3, p. 1; *see* Joseph Bower & Stuart Gilson, *The Social Cost of Fraud and Bankruptcy*, Harv. Bus. Rev., Dec. 2003, at 20 (if WorldCom had priced to actually earn what it reported, a "crude estimate" suggests industry could have

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[11] Of course, as this Court noted in *Holmes*, 503 U.S. at 273, those directly injured by accounting frauds like those perpetrated by WorldCom — investors — can be counted on to bring suit to obtain compensation for harms caused by, and thereby to deter, such fraud. *See, e.g., In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 267 (S.D.N.Y. 2003), *appeal granted in part sub nom. Hevesi v. Citigroup, Inc.*, 366 F.3d 70 (2d Cir. 2004).

yielded "an extra $40 billion in revenue"). The expansion of RICO standing permitted by the court of appeals in this case would provide an opportunity for future competitors that thought they were disadvantaged by fraudulent accounting practices to use the federal courts to repair their economic position.

Federal remedies for the problems of anticompetitive conduct and accounting fraud already exist, and government has ample tools to address tax fraud. Expanding civil RICO to allow competitors to invoke the mail and wire fraud statutes in those areas will provide a new federal claim for injury, one that focuses on competitive advantage "unfairly" obtained through a scheme to defraud. There is no reason to believe that Congress intended to create such a right when it provided treble damages for fraud-based RICO claims, particularly when the background common-law rules for proving damages from fraud under the RICO statute require careful analysis of proximate cause and reliance by the plaintiff on the defendant's misrepresentations. Indeed, it would be particularly ironic in antitrust cases if RICO's private treble-damages provision, modeled as it was on the antitrust laws, were interpreted in a way that permits the purposeful evasion of those very laws.

B. Allowing Non-Defrauded Competitors To Sue Under RICO Would Transform Run-Of-The-Mill State-Court Disputes Between Business Rivals Into Federal Civil RICO Actions

As the foregoing section suggests, upholding the Second Circuit's approach could widely expand the scope of civil RICO's reach. Products liability offers just one example of an area of state law that could conceivably be federalized by this Court's acceptance of the court of appeals' approach. Products-liability claims often involve misstatements to various parties, from regulators to Congress to initial customers. *See, e.g., Summit Props.*, 214 F.3d at 558 (marketing campaign for defective plumbing system was directed at building code approval officials, members of the building

industry such as builders and plumbers, and other consumers). Indeed, courts have already suggested that competitors could bring such suits under the type of theory adopted by the court of appeals in this case. *See id.* at 561 (suggesting, in dictum, that "defendants' competitors might recover for injuries to competitive position" if they alleged that they were the "target" of the fraud). The consequence of upholding the Second Circuit's decision in this case would be to increase the likelihood that such suits will be transformed into civil RICO suits alleging mail and wire fraud as predicate acts, brought by competitors disadvantaged by any competitive advantage secured from marketing products that subsequently turn out to be defective. *See id.* at 557 (retaining the general rule that reliance by the plaintiff is required because to do otherwise would "read RICO as establishing a federal products liability scheme complete with treble damages and attorney fees for the benefit of end-users of defective products who never relied on manufacturers' alleged misrepresentations of product quality").

State laws regarding fraud and unfair competition already permit competitors to complain about unfair competitive advantage gained from misrepresentations. *See, e.g.*, N.Y. Gen. Bus. Law § 349 (McKinney 2004) (deceptive acts or practices). Keeping such claims within the ambit of state law would recognize the ability of States to experiment in this area "without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Under the court of appeals' holding, by contrast, any commercial enterprise seeking an advantage over its competitor could bring a civil RICO action, with the attendant *in terrorem* effect of a prayer for treble damages and attorneys' fees, based on any allegation that the competitor had obtained financial gain through what could be described as a fraudulent scheme with related mailings or use

of the wires.[12] Indeed, if, as the court of appeals held, reliance by a third party and not the plaintiff suffices, it would be easier for a plaintiff to recover under civil RICO than under the common law of fraud. Coupling the removal of the requirement of detrimental reliance by the plaintiff with the prospect of recovering treble damages and attorneys' fees would provide a powerful incentive for plaintiffs to transform ordinary commercial disputes into federal RICO lawsuits. This Court should presume that Congress did not intend such a result. *Cf. Apex Hosiery Co. v. Leader*, 310 U.S. 469, 513 (1940) ("The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress."); *cf. also Cleveland*, 531 U.S. at 24-25 (stating, in a mail fraud prosecution in which the misrepresentations involved were illegal under state law, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes") (internal quotation marks omitted). Reversal of the Second Circuit's decision in this case would maintain the federal-state balance and contain fraud-based civil RICO claims within the common-law bounds intended by Congress.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded for reinstatement of the judgment of the district court, dismissing the complaint.

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[12] *See* Hon. David B. Sentelle, *Civil RICO: The Judges' Perspective and Some Notes on Practice for North Carolina Lawyers*, 12 Campbell L. Rev. 145, 157 (1990) ("Not only do civil RICO plaintiffs obtain the leverage of a treble damages and attorney fees recovery, but they confront usually legitimate business with the prospect that the day after the filing of complaint a local newspaper will headline 'ABC Corporation and its President Charged with Racketeering in Federal Court.' ").

Respectfully submitted,

RICHARD L. HUFFMAN
WILLIAM M. BRODSKY
V. DAVID RIVKIN
FOX HORAN & CAMERINI LLP
825 Third Avenue, 12th Floor
New York, New York 10022
(212) 480-4800

HARRY FIRST
40 Washington Square South
New York, New York 10012
(212) 998-6211

DAVID C. FREDERICK
Counsel of Record
BRENDAN J. CRIMMINS
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

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TABLE OF CONTENTS

Page

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.*:

18 U.S.C. § 1961 ..... 1a

18 U.S.C. § 1962 ..... 5a

18 U.S.C. § 1963 ..... 7a

18 U.S.C. § 1964 ..... 16a

18 U.S.C. § 1965 ..... 18a

18 U.S.C. § 1966 ..... 19a

18 U.S.C. § 1967 ..... 20a

18 U.S.C. § 1968 ..... 21a

Mail Fraud Statutes, 18 U.S.C. § 1341 ..... 27a

Wire Fraud Statutes, 18 U.S.C. § 1343 ..... 28a

18 U.S.C. § 1961 provides:

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in

application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1591 (relating to peonage, slavery, and trafficking in persons), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), sections 175-178 (relating to biological weapons) , sections 229-229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement

from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the

law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. § 1962 provides:

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1963 provides:

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (l) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the

court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper.

Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury

any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to—

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection (l), no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after

the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(l)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a

hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant--

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

18 U.S.C. § 1964 provides:

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the

United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

18 U.S.C. § 1965 provides:

§ 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

18 U.S.C. § 1966 provides:

§ 1966. Expedition of actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action.

18 U.S.C. § 1967 provides:

§ 1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

18 U.S.C. § 1968 provides:

§ 1968. Civil investigative demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall—

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall—

(1) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by

a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by—

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f)(1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in

writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of—

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case or proceeding arising from such investigation,

the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly—

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.

18 U.S.C. § 1341 provides:

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1343 provides:

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.